No. 92-1938

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In its response, Zoecon relies on unsupported factual allegations and mischaracterizations of the case law in an effort to convince this Court that review of the FIFRA preemption issue is unnecessary. Contrary to Zoecon's contentions, however, the conflict over FIFRA preemption is real and clarification from this Court is urgently needed.

1. *The Conflict Among the Lower Courts Is Authentic.*

Zoecon's Opposition erroneously asserts that there is "no split of authority" on the FIFRA preemption issue. Brief in Opposition ("Opp.") at 11. As set out more fully below, Zoecon's arguments rest largely on mischaracterizations of the relevant law and the facts of this case. In fact, the preemption decision of the Eleventh Circuit presents numerous conflicts with the lower courts on all of the key FIFRA preemption issues.

Zoecon does not deny that the decision of the District of Columbia Court of Appeals in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) directly conflicts with the decision of the Eleventh Circuit below. *See* Opp. at 16. Nevertheless, Zoecon attempts to dismiss this conflict by arguing that the *Ferebee* decision was "effectively overruled" by this Court's opinion in *Cipollone v. Liggett Group*, 112 S.Ct. 2608 (1992). *See* Opp. at 16 n.20.

The decision in *Ferebee*, however, is wholly consistent with the reasoning of *Cipollone*. As Zoecon concedes, *Cipollone* mandates an express preemption analysis when the statute at issue contains an express preemption provision, such as that contained in FIFRA. Opp. at 22. The D.C. Court of Appeals engaged in an express preemption analysis in *Ferebee* and found that FIFRA does not expressly preempt state common law tort claims.

Ferebee, 736 F.2d at 1542.[1]

Zoecon's contention that *Ferebee* was "effectively overruled" rests on a wild simplification of this Court's holding in *Cipollone*: that the issue of preemption turns on Congress's use or non-use of the word "requirement." Opp. at 16 n.20. The *Cipollone* plurality, however, viewed as determinative not the 1969 Cigarette Act's use of the magic word "requirement" (as opposed to the use of the words "statement" and "require" in the 1965 Act), but Congress's overall *expansion* of language from the 1965 Act to the 1969 Act and the fact that Congress had purposefully broadened the scope of the Act's preemption provision during the legislative process.[2] *Cipollone*, 112 S.Ct. at 2620-21. Recognizing that FIFRA's language and history are quite different from that of the 1969 Cigarette Act, lower courts, in post-*Cipollone* rulings, continue to hold that FIFRA does not preempt common law claims. Pet. at 12 n.11. Plainly, the lower courts continue to be divided on this important federal question.

The conflict between the Eleventh Circuit's holding with respect to off-label warnings and the decisions of the Second and Ninth Circuits that FIFRA's preemption provision does not encompass off-label information is equally direct.[3] Pet. at 14-16,

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[1] Contrary to Zoecon's assertions, this holding was not challenged until after the lower courts issued the erroneous implied preemption rulings in the cigarette cases that were ultimately over-turned by *Cipollone*. *See* Pet. at 8-9.

[2] Were it otherwise, this Court's analysis of the differences between the two acts at issue in *Cipollone* would be reduced to Congress's arbitrary use of a "magic suffix" *(see Cipollone* at 2618, noting that the 1965 Act utilized the word "requir*ed*," and at 2619, citing the 1969 Act's reference to "requir*ements*" (emphases added)).

[3] As Zoecon concedes, the lower court's holding essentially treats "any failure to warn claims [as] a claim for inadequate labeling," including claims that challenge "the adequacy of warnings on materials other than the label or the

citing Chem. Specialties Mfrs. Ass'n. v. Allenby, 958 F.2d 941 (9th Cir.), *cert. denied*, 113 S.Ct. 80 (1992); *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989). In a patently bogus attempt to distinguish these cases, Zoecon argues that since the Ninth and Second Circuits define "labeling" differently than the court below, there is no conflict on the preemption issue. Opp. at 18-19. Zoecon's argument, however, obscures the underlying conflict: that the courts of appeals disagree about the breadth of FIFRA's "labeling" definition. Because of this difference of opinion, these courts necessarily reach different results on the FIFRA preemption question.[4]

Zoecon's discussion of the Eleventh Circuit's conflict with the Florida Court of Appeal with respect to breach of warranty claims also attempts to obscure the difference of opinion between the two courts. *See* Pet. at 17; Opp. at 21. Zoecon asserts that since the Florida Court of Appeal characterizes the breach of warranty claim as a "voluntary contractual commitment" and the court below characterizes the claim as stemming from an "involuntary" commitment, there is no inconsistency between the two decisions. Opp. at 21. This characterization of the cases, however, glosses over the source of the conflicting results in the two cases, which is a disagreement over how to characterize a breach of warranty claim. Consistent with *Cipollone*, the Florida Court of Appeal characterizes breach of warranty claims as "voluntarily undertaken." *See Cipollone*, 112 S.Ct. at 2622 (discussing express warranty) and *Brennan v. Dow Chem. Co.*, 613 So.2d 131, 132 (Fla. Dist. Ct. App. 1993) (discussing breach of warranty generally). The court below disagreed with the

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package of the product." Opp. at 17-18.

[4] Zoecon's argument that the *Jorling* decision is somehow limited to state requirements for commercial applicators and cannot be extended to manufacturers is also without merit. *See* Opp. at 19. Clearly, nothing in FIFRA singles out manufacturers for special protection from state law.

opinion of the Florida Court of Appeal and characterized implied breach of warranty claims as involuntary and, thus, preempted by FIFRA. Opp. at 21, Pet. App. at 8a-10a. These courts are plainly in conflict with respect to FIFRA preemption of breach of warranty claims.

Zoecon similarly evades the real issue with respect to the conflict of the decision below with the Fourth Circuit's holding that state actions which "impose a duty to improve a product or to maintain a label in accordance with the federal standards" are not preempted by FIFRA. *Worm v. American Cyanamid*, 970 F.2d 1301, 1308 (4th Cir. 1992), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D.Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992); Pet. at 16-17. In an apparently desperate attempt to deny the circuit split on this point, Zoecon contends that the two findings are not in conflict because Zoecon has "at all times distributed its product with the EPA-approved labeling." Opp. at 20 n.23.

Zoecon's argument is flawed in two respects. First, it is a factually based argument that ignores the Papases' contrary factual allegations that were appropriately accepted as true by the courts below for purposes of resolving the FIFRA preemption issue. Pet. App. at 6a-7a; 15a. Second, even assuming the factual truth of Zoecon's contention, the fact that a product carries a label that was accepted by the EPA at one time does not mean that the label still complies with standards set out in FIFRA. *See* Pet. at 21 n.16 (describing ongoing duty under FIFRA to modify label). Under either version of the facts, a conflict with the Fourth Circuit remains.

As even a cursory review of these cases makes clear, the conflict among the lower courts is hardly "contrived," as alleged by Zoecon. Opp. at 17. On the contrary, the split is very real, with real costs for pesticide victims and our system of justice. *See* Pet. at 18-19.

2. *Post-Cipollone Decisions Confirm That Clarification From This Court Is Needed.*

Zoecon argues that *Cipollone* affords "all the guidance" the lower courts need and that further clarification is unnecessary. Opp. at 11. In fact, what the pre-and-post-*Cipollone* decisions prove (including the decision in this case) is that *Cipollone* did *not* resolve the conflict among the lower courts. Indeed, in several instances since *Cipollone*, courts have expressly disagreed with the result reached in other cases. *See, e.g., MacDonald v. Monsanto Co.*, 813 F. Supp. 1258 (E.D.Tex. 1993), *appeal filed*, No. 93-4817 (5th Cir. May 11, 1993)(disagreeing with *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993)(Arkansas-Platte II)); *Gibson v. Dow Chemical Co.*, CV 92-30 (E.D. Ky. Oct. 19, 1992), slip. op. at 5 (disagreeing with *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992), *re-aff'd*, Arkansas-Platte II). *See also Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 933 n.2 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (1993) ("We do not find *Cipollone* instructive"); *The Supreme Court -- Leading Cases*, 106 Harv. L. Rev. 163, 355-357 (1992) ("[FIFRA] preemption decisions in the wake of *Cipollone* indicate the need for clarification."). In light of the wide-spread conflict, it is apparent that *Cipollone* did not provide the lower courts with sufficient guidance to resolve the FIFRA preemption question.

3. *The EPA Is Not Responsible For The Adequacy Of A Pesticide Label; Nor Does It Have The Resources To Take This Responsibility.*

Contrary to Zoecon's blatantly false assertion, Congress did not vest the EPA with "responsibility to devise appropriate warnings for each pesticide product." Opp. at 24. Rather, as the EPA has expressly noted, it is the registrant's responsibility to provide a label that adequately warns about the product. 53 Fed. Reg.15,956 (May 4, 1988)("*The registrant must take responsibility*

for quality control of the product's composition and *for adequate labeling* describing the product, its hazards and uses." (emphasis added)).[5]

Moreover, the EPA does not have the "necessary resources, expertise and experience, to determine what warnings a pesticide product's manufacturer should provide," as Zoecon contends. Opp. at 6. A recent report from the Inspector General of the EPA concluded, "EPA cannot provide the public with assurance that precautionary statements on many pesticide labels are adequate." *Labeling of Pesticides: Report of Audit No. E1EPF1-05-0429-2100613* (Sept. 30, 1992), at ii. The report also found that "[a]lmost half the pesticide labels evaluated had missing or inaccurate precautionary statements" and that "[o]ther pesticides were missing statements restricting usage of the pesticide to certified applicators." *Id.*

Plainly, the EPA has neither the responsibility nor the resources to draft adequate labels for the thousands of pesticides that are on the market. Knowing these deficiencies, Congress could not have intended to immunize manufacturers who evade this responsibility from liability for injuries that result from inadequate labeling.[6]

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[5] As Zoecon concedes, the regulations show that the manufacturer is responsible for crafting the label and that the labeling regulations permit variations even among products containing the same active ingredients. Opp. at 7, 8 n.12. For this reason, Zoecon's equation of the words "uniform" with "identical" is misleading with respect to FIFRA labeling. *See* Opp. at 6.

[6] Zoecon's speculation that, had the EPA been informed of the presence of benzene in Zoecon's product, the agency would not have required Zoecon to disclose this fact to the Papases only reinforces the Papases' contention that the EPA's regulation of pesticides is woefully inadequate and was never intended by Congress to immunize manufacturers from liability for labeling deficiencies. *See* Opp. at 9.

4. *Zoecon's Factual Allegations Are Unsupported By The Record Evidence And Irrelevant At This Stage Of The Proceedings.*

Zoecon concedes at the outset of its brief that, "No trial has been held in this case." Opp. at 2. Nevertheless, relying on innuendo and factual allegations that are wholly unsupported by the record evidence in this case, Zoecon urges this Court to ignore the unjust outcome that will result if the lower court's opinion is permitted to stand.[7]

For example, contrary to Zoecon's contention, the record evidence is that the amount of benzene allegedly present in its product was not "toxicologically insignificant."[8] Opp. at 9. More importantly, for purposes of deciding the FIFRA preemption issue, the lower courts accepted the Papases' allegation that Mr. Papas is suffering from a benzene induced illness that was caused by an inert ingredient in Zoecon's product.[9] *See* Pet. App. at 36a.

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[7] Some of these allegations are truly astounding. For example, Zoecon's suggestion that Mr. Papas suffered benzene poisoning because he failed to follow the label warnings completely ignores that Zoecon's label failed to advise Mr. Papas that the product contained benzene. *See* Opp. at 3.

[8] In fact, the only knowledgeable witness to testify on this matter pointed out that the quantity of benzene was several hundred times the so-called "safe limit."

[9] Petitioners attempted to amend the complaint to add the manufacturer of the inert ingredient to the litigation, but the district court did not permit the joinder because, in its view, the claims against the manufacturer included failure to warn claims that are likely preempted. *See* Pet. App. at 31a. The separate suit, referenced in Zoecon's brief at 3 n.4, was filed to avoid the arguable running of the statute of limitations. The suit has been stayed by the same district judge presiding over this case, pending the instant appellate proceedings' resolution.

Accordingly, these are the allegations which this Court should accept for purposes of deciding the Papases' petition for *certiorari*.

CONCLUSION

This Court should grant the Petition For A Writ of *Certiorari*.

Respectfully submitted,

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